
August 24, 2004

**VIA ELECTRONIC FILING**

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, SW
Washington, DC 20554

**Re: Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area; WC Docket No. 04-223**

Dear Ms. Dortch:

Attached are comments of the Association for Local Telecommunications Services ("ALTS") for filing in the above-captioned proceeding.

Sincerely,

/s/

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**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

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| In the Matter of | ) | |
| | ) | |
| Petition of Qwest Corporation for | ) | WC Docket No. 04-223 |
| Forbearance Pursuant to 47 U.S.C. § 160(c) in | ) | |
| the Omaha Metropolitan Statistical Area | ) | |
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# COMMENTS OF THE ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES

The Association for Local Telecommunications Services ("ALTS") hereby files its comments in the above-referenced proceeding in response to the Commission's Public Notice[1] regarding Qwest's petition for forbearance.[2] Qwest requests relief from Section 251(c) and certain parts of Section 271 on the basis of its claim that it is no longer dominant in the Omaha, Nebraska Metropolitan Statistical Area ("MSA"). Furthermore, Qwest asks the Commission to eliminate regulation of Qwest as a dominant carrier and as the ILEC in the Omaha MSA. ALTS emphasizes that even if the Commission finds that Qwest has lost a significant share of the retail local market, it must affirm that Qwest is still the dominant provider of wholesale wireline facilities and therefore reject Qwest's request for relief from Sections 251 and 271. The relief Qwest seeks is more properly analyzed in the granular competitive assessment to be conducted by the Commission in its Triennial Review Order ("TRO") remand proceeding, because Qwest

[1] *Wireline Competition Bureau Extends Comments Cycle on Petition of Qwest Corporation for Forbearance in the Omaha Metropolitan Statistical Area*, Public Notice, WC Docket No. 04-223 (rel. July 30, 2004).

[2] Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area, WC Docket No. 04-245 (filed June 21, 2004) ("Qwest Petition").

in essence seeks relief from unbundling obligations.[3]

Qwest begins its petition first by observing that Congress enacted the Telecom Act to both promote competition and reduce regulation and then by criticizing the Commission for focusing primarily on encouraging competition rather than on reducing regulation.[4] At the outset, ALTS disagrees with Qwest's characterization of recent Commission actions. The Commission has been focused intently over the past several years on granting extensive – and ALTS would argue, excessive – deregulatory relief to the ILECs. For example, the Commission has already awarded the ILECs pricing flexibility for special access services, granted significant relief for broadband fiber facilities in its *Triennial Review Order*, and most recently eliminated the pick-and-choose rule and extended fiber relief to multi-dwelling units. Furthermore, the Commission has various pending deregulatory proceedings, such as the Broadband NPRM, ILEC Nondominance NPRM, TELRIC NPRM, and TRO remand proceeding. For Qwest to claim that the Commission has not focused sufficiently on deregulation is disingenuous and clearly highlights Qwest's true motive, which is to eliminate all regulation of its facilities regardless of the state of competition throughout its region.

ALTS also disputes Qwest's claim that "Congress's vision of a competitive marketplace has been achieved."[5] While it is true that local competition has expanded in certain retail markets since 1996, there is no basis for Qwest's suggestion that the Commission no longer needs to focus its efforts on encouraging competition, but should instead turn its attention to granting

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[3] *See In the Matter of Unbundled Access to Network Elements and Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order And Notice Of Proposed Rulemaking, WC Docket Nos. 04-313 and 01-338 (rel. Aug. 20, 2004).

[4] Qwest Petition at iii.

[5] *Id*.

widespread regulatory relief. Qwest implies that Congress equally emphasized its goals of promoting competition and reducing regulation; however, in doing so, Qwest conveniently ignores the statutory quid pro quo arrangement between sections 251 and 271. Those statutory provisions clearly require the BOCs to unbundle certain network elements and open their markets to competition *first* before they reap the benefits of deregulation. Congress did not charge the Commission to hastily remove necessary regulations from the BOCs before wholesale alternatives exist for competitors. And although Qwest's petition may indicate that it is subject to retail competition in the Omaha MSA, Qwest provides no evidence to show there are significant wholesale alternatives to its bottleneck facilities, especially loops and transport. Thus, the Commission should deny Qwest's request for relief from its wholesale obligations under sections 251 and 271.

## I. Qwest's Petition is More Appropriately Handled in the Triennial Review Order Remand Proceeding.

The proper forum for Qwest's request for relief from sections 251 and 271 is the Commission's recently released NPRM in the TRO remand proceeding, where it can suitably address Qwest's unbundling requirements, such as those for specific transport routes and loop locations in the Omaha MSA. In the TRO remand proceeding, the Commission will be able to conduct a granular analysis of the wholesale alternatives available to competitors to determine which UNEs may no longer satisfy the "necessary and impair" standard and may be removed from the section 251 unbundling list. And certainly no forbearance from sections 271(c)(2)(B)(i-vi) and (xiv) should be considered for UNEs that must still be unbundled under Section 251. If those UNEs continue to satisfy the "necessary and impair" standard of section 251(d)(2), then certainly it would not be in the public interest to eliminate those requirements under section 271. In short, Qwest's filing of this petition while the Commission is in the midst of considering its

permanent UNE rules is premature and a waste of both Commission and industry resources forced to respond to these claims.

Until CLECs can purchase wholesale alternatives on every loop and transport route in the Omaha MSA, Qwest is not entitled to sweeping deregulation throughout the MSA. Qwest claims that competitors in the Omaha MSA "primarily use" their own networks and facilities but provides no data to support this claim. Furthermore, while competitive carriers may use their own switching facilities, that still does not justify widespread deregulation of Qwest's facilities throughout the Omaha MSA. And there can be no determination regarding deregulation of those facilities until the Commission conducts its granular analysis in the TRO remand proceeding. Qwest makes the blanket statement that there are no barriers to entry in the Omaha MSA because "[c]ompetitive providers have other market entry options in those areas where they choose not to deploy facilities"[6] and that it "is no longer the exclusive source of switching and local loop facilities in the Omaha MSA."[7] If this is truly the case, Qwest should provide detailed evidence of those alternatives (either via self deployment or third party providers) in the TRO remand proceeding, not employ these vague statements here where it asks for sweeping relief throughout the MSA. It is clear from Qwest's request for elimination of both sections 251 and 271 requirements that it intends to remove all competitive access to bottleneck facilities it controls. This is classic monopolistic behavior, and the Commission must not allow it.

## II. Even if Qwest is Subject to Retail Competition, Qwest Still Controls Bottleneck Facilities and is the Dominant Provider of Wholesale Wireline Facilities.

Qwest may be entitled to certain relief for its retail services if the Commission

[6] *Id.* at 17.

[7] *Id.* at 14.

determines that it is subject to sufficient retail competition in the Omaha MSA; however, such a finding should have no impact on Qwest's obligation to provide wholesale services to competitors. Throughout its petition, Qwest stresses its loss of retail market share while attempting to argue that it should be deregulated in the wholesale market; however, this assertion is unfounded without other competitive data regarding the wholesale market. Qwest suggests because it is no longer the sole facilities-based LEC in the Omaha MSA market, that it should be deregulated,[8] but there is more to the inquiry than whether Qwest is the only LEC in the market. Qwest still controls the bottleneck facilities regardless of whether there are other facilities-based providers, and to gain relief from section 251 requirements, Qwest must show that competitors are not impaired from providing services without access to Qwest's facilities. Qwest has not even attempted to make such a showing in its petition, but instead relies solely on the fact that it is subject to retail competition in the Omaha MSA. As discussed above, the proper investigation of these issues is the one to be conducted in the TRO remand proceeding, where the Commission will be able to review granular data regarding competitive alternatives for specific wholesale facilities at specific locations, not just high-level ILEC market share data in an entire MSA.

Qwest claims it is "no longer the dominant carrier in the Omaha MSA telecommunications market, and that Qwest no longer enjoys market power in the Omaha MSA."[9] Qwest fails to specify that it is referring to the *retail* telecommunications market; however, all of the arguments presented in its petition rely entirely on evidence of retail competition, including CLEC market share data and the drop in its own retail market share.[10] It

[8] *Id.* at 13.

[9] *Id.* at 5.

[10] *Id.* at 18-20.

presents no data or evidence of competitive alternatives for loops or transport routes. Although the existence of facilities-based competition may lead to the existence of competitive retail alternatives, retail competition alone does not equate to wholesale competition. The existence of alternatives for retail customers does not equate to the existence of alternatives for wholesale customers; therefore, the status of retail competition should not be used as a basis for eliminating wholesale competition and competitive access to Qwest facilities. While retail competition may reduce Qwest's ability to raise prices above competitive levels, to reduce the quality of its services, to reduce innovation or to restrict its output for *retail* services,[11] it will not necessarily curb anticompetitive behavior in the wholesale market. In fact, most of the CLECs operating in Qwest's territory will affirm that Qwest wholesale performance has been consistently poor despite the regulatory requirements and safeguards already in place. Certainly without those requirements, one could predict that Qwest's wholesale performance would continue to deteriorate.

Furthermore, Qwest points to competition from CMRS providers and CATV providers as its primary competition in the Omaha MSA. However, neither of these provides competition such that unbundling requirements in Section 251 should be eliminated. Qwest claims "there are multiple true facility-based providers … who are not relying on Qwest's section 251(c) offerings…"[12] Yet, these are not necessarily facilities-based *wireline* providers that could provide alternatives to Qwest's transport and loop facilities. Until the Commission determines that wireline competitors have appropriate wholesale alternatives, Qwest must be required to unbundle its bottleneck facilities. Furthermore, Qwest includes VOIP providers as significant

[11] *See Id.* at 21.

[12] *Id.* at 3.

competitors in the Omaha MSA, but as ALTS has noted in other proceedings, VOIP services ride on the underlying facilities of the ILEC and do not provide wholesale competition to the ILEC. IP-enabled applications require an underlying broadband platform to enable their full functionality. Thus, although many companies have deployed their own IP networks to transit traffic, there is in no way reduced reliance on or need for competitive access to the underlying ILEC bottleneck facilities, particularly for broadband loops.

Qwest highlights that CLECs in the Omaha MSA are shifting away from resale services and using their own facilities.[13] This is positive news for the competitive market and is exactly the shift to facilities-based competition that ALTS supports; however, this trend alone provides no substantiation for Qwest's claim that it deserves freedom from sections 251 and 271 unbundling requirements throughout the Omaha MSA. And ironically, if the Commission granted such relief to Qwest, it would greatly risk reversing that trend. Qwest even supports that reversal by suggesting that after deregulation, CLECs may "increase their market presence through resale beyond the reach of their existing networks."[14] Thus, Qwest admits that granting its deregulatory request will likely lead competitors to utilize more resale services because they would no longer have access to Qwest's wholesale facilities. On the other hand, however, Qwest's petition requests relief from its obligation to provide resale under section 251(c)(4) and 271(c)(2)(B)(xiv), so it is questionable whether competitors could in fact utilize a resale strategy to reach those customers beyond the scope of their own networks. In the end, without competitive access to the bottleneck facilities either through section 251 or 271, many customers now served by CLECs that do utilize Qwest's facilities would most likely lose their ability to

[13] *Id.* at 13.

[14] *Id.* at 17.

purchase competitive local services.

Qwest claims if granted the relief it requests, that it would negotiate market prices for access to its facilities.[15] However, if that were truly Qwest's plan, it would not so vehemently protest access under section 271, which the Commission has found requires just and reasonable terms and conditions for access according to sections 201 and 202. Since sections 201 and 202 would continue to apply to those services provided outside of section 271, it is clear that Qwest is arguing for the ability to deny access to competitors, not just for the ability to negotiate so-called market prices. The Commission must recognize Qwest's plea for what it is – an appeal to gain absolute power to thwart any growth in competition – and stop Qwest in its tracks.

## III. Granting Qwest Forbearance From Section 251 and 271 Is Not in the Public Interest.

Qwest argues that elimination of section 251 and 271 requirements is in the public interest and will benefit consumers merely because it would reduce the regulatory asymmetry.[16] The crux of Qwest's argument, however, is that elimination of regulatory requirements would benefit consumers because it would benefit Qwest in the marketplace.[17] Qwest seems to ignore the fact that the telecommunications regulatory scheme, including asymmetrical treatment of providers, was established by Congress in the Telecom Act. Thus, certainly it was Congress's intent for certain carriers to be treated differently, at least until suitable levels of wholesale and retail competition exist. And until the goals and requirements of the Telecom Act are fully satisfied, Qwest must continue to be subjected to appropriate regulation because Congress deemed that to be in the best interests of consumers. Qwest complains that it is subject to

[15] *Id.* at 26.

[16] *Id.* at 28.

regulation that is not imposed on its competitors; however, such asymmetrical regulation exists because Qwest still has market power and controls bottleneck facilities, whereas its competitors do not.[18] The regulatory requirements imposed on Qwest serve a valuable purpose in the market today, and the Commission should not eliminate them merely because they are asymmetrical.

Qwest argues that there may be alternative wholesale providers in the marketplace but that they may currently have "no incentive to compete for wholesale business with ILEC facilities that must be offered at artificial prices set by regulators."[19] In other words, Qwest believes that there may be providers in the market that would provide access to their wholesale facilities if the prices that Qwest charged for its wholesale facilities were higher. So, in essence, Qwest here attempts to persuade the Commission to reduce its regulatory burden so that Qwest can increase prices to its wholesale customers, in the hopes of drawing some other wholesale providers out of the woodwork. Qwest apparently believes that it would be preferable for competitors to have access to wholesale facilities at higher prices than to have access to Qwest's facilities at all. It is hard to comprehend how this could possibly be in the best interests of competitors or consumers, who will ultimately pay those higher prices. Increased competition should lead to lower, not higher, prices. These higher prices that would result from the deregulation Qwest recommends would benefit no one but Qwest.

ALTS continues to assert that the best way to encourage competition in a market where there are limited wholesale facilities is to continue requiring Qwest to provide them at cost-based rates under section 251, not to allow Qwest the freedom to increase rates that would likely drive

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[17] *Id.*

[18] *Id.* at 24.

[19] *Id.* at 29.

competitors out of the market, or deny access entirely. Regulation and unbundling of Qwest's wholesale facilities is exactly what has encouraged competition and led to the drop in its retail market share in the Omaha MSA. Qwest's retail market share data are positive demonstrations of a developing competitive telecommunications marketplace as Congress envisioned. Therefore, the Commission should embrace that data as a welcomed outcome, not pity Qwest or attempt to restore its market share by granting its requested regulatory relief.

ALTS strongly disagrees with Qwest's assertion that "[t]here is no reasonable basis for thinking that competition will be impaired in the event of forbearance from section 251(c) and Section 271"[20] and that "the legal and policy underpinnings for unbundling simply no longer exist."[21] As discussed above, it is solely because of these regulations that widespread retail competition has developed in the Omaha MSA, and unbundling is still necessary there until Qwest demonstrates in a detailed Commission review process that certain UNEs on specific routes and locations may be removed from the section 251 unbundling list. While elimination of unnecessary regulation may comport with Congress's goals in the Telecom Act, elimination of regulation merely for the sake of doing so or elimination of regulation which serves a valuable purpose in the competitive marketplace certainly do not comport with those goals. In its petition, Qwest indicates that other CLECs "have overbuilt Qwest's legacy facilities"[22] but does not demonstrate that those CLECs use *none* of Qwest's facilities currently. Qwest seems to suggest that granting its request would be in the public interest merely because it would allow Qwest to adapt to the market; however, Qwest provides no demonstrable evidence that consumers would

[20] *Id.* at 24.

[21] *Id.*

[22] *Id.* at 9.

be better off in a deregulated environment.[23] Because CLECs continue to need access to Qwest's facilities to serve their customers, ALTS asserts that granting Qwest's sweeping request would not be in the public interest because customers would no longer have the benefit of competitive choice.

## CONCLUSION

For the foregoing reasons, ALTS urges the Commission to reject Qwest's request for relief from sections 251 and 271. If the Commission decides to declare Qwest a nondominant retail provider in the Omaha MSA, it must recognize that Qwest still possesses market power in the wholesale market there and should continue to be regulated accordingly. Granting Qwest relief from unbundling requirements in the Omaha MSA would not be in the public interest because it would lead to higher wholesale rates, thereby increasing competitor retail rates and possibly reducing choices for consumers.

Respectfully Submitted,

**Association for Local Telecommunications Services**

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[23] *Id.* at 28.